

Written evidence submitted by Sir Jonathan Faull¹ (FRE0004)

What impact has the COVID-19 pandemic had on the negotiations? Have the UK and EU been affected differently? What further consequences might the pandemic have on the progress of the negotiations and the nature of any future relationship?

It has made face to face meetings impossible and altered the priorities of leaders on both sides. The new relationship between the UK and the EU is being negotiated and will be implemented in very different circumstances from those which prevailed until early 2020: pandemic, crisis and reconstruction, new trade relationships worldwide, decline and possible recasting of international organisations (WTO, WHO), etc. The EU itself could emerge from crisis a very different organisation from the one the UK left on 31 January 2020.

- *How would you characterise the approach the UK and EU are taking to the future relationship negotiations? In which ways, if any, do these approaches differ from the withdrawal negotiations? What new challenges might both parties face?*

So far, it is hard to discern any real negotiation at all. Both parties are repeating and explaining a little more clearly their “red lines”. There is no sign of engagement on trade-offs. Nor is there any visible sign of preparation on the ground for what has been agreed or could possibly be agreed. For example, what new infrastructure is being set up in the ports of Cairnryan, Larne or Dover? Checks on trade between Great Britain and Northern Ireland, within the United Kingdom therefore, are still said by the British Government to be unnecessary and by the EU to be indispensable for the implementation of the withdrawal agreement. The skirmish under way at the time of writing about a European Commission office in Belfast does not suggest that a constructive, pragmatic approach has yet been found. The challenge both parties face will be to give effect to the compromise language contained in the withdrawal agreement and political declaration, most evident in the squaring of circles in respect of Northern Ireland but equally present in the level playing field arguments, all in the midst of the disruption caused by Covid 19. Sporting metaphors have featured extensively in the Brexit debates, not always helpfully. The level playing field is an attractive notion, appealing to the sense of fair play both sides believe to be their natural default position; however, just as sports have detailed rules, the UK-EU relationship needs them too.

- *What is your assessment of the likelihood of an agreement given both sides’ negotiating mandates? Has this assessment changed since the talks began? If so, why?*

If they are interpreted inflexibly, very little.

¹ Sir Jonathan Faull (responding in a personal capacity); Chair, European Public Affairs, Brunswick Group; formerly Director General, European Commission.

- *What progress would you expect to have been made by the end of June? How do you think talks might progress over the coming year? How long would you expect the UK and EU's respective ratification processes to take?*

By the end of June, at the current rate of progress, very little will have been achieved. Even the basic structure of the agreement(s) and how it (they) should be enforced, both crucial preliminary questions, have not yet been agreed. Acceleration of negotiations will be needed if substantial progress is to be made soon.

The duration of the ratification process depends in large measure on the scope and content of the agreement(s). If, on the EU side, ratification by all Member States is necessary, a process which in Belgium would include that country's devolved regions, several years might be needed, particularly if controversial political issues arise.

- *Given the time constraint imposed by the Transition Period, what sort of agreement do you believe is possible between the UK and the EU? What issues should each side be prioritising? To what extent do the priorities set out in each side's negotiating mandates match your assessment of what they should be seeking? On which areas does each side have the most negotiating leverage?*

The time constraint, assuming no extension, is severe. Neither side could be proud of a failure to agree, which would reflect badly on both and on the continent of Europe as a whole. The inevitable blame game, as each sought to highlight the other side's responsibility, would be unseemly and foolish at a time of international fragmentation during which cooperation will be needed in the reconstruction effort. Only a narrow agreement seems possible in current circumstances.

- *What would be the main differences between a UK/EU relationship as roughly set out by both sides' mandates and a no-deal scenario?*

If agreement is reached, there would be an agreed set of rules governing the relationship and some mechanism for enforcement and redress in the event of breach. "No deal" would mean there are no specific agreements and, subject to the general rules of international law and specific agreements to which both the EU and the UK are party, each side can do what it wants. There would be customs checks and duties, no "passporting" for services and over time divergent regulatory requirements for goods, services and data transfers, only ad hoc arrangements in place of today's structured cooperation on such matters as border control, recognition of judgments, extradition...

If only a limited deal is agreed what are the possible consequences for areas that are not covered?

The removal and failure to replace a complex set of common legal commitments would inevitably cause disruption. Anything left outside the deal would be governed by the domestic laws of the UK and the EU (and its member states) in their respective territories, subject to general rules of international law and specific agreements to which they are both

party. Some or all of the areas not covered would be the subject of discussions and possibly further negotiations in the years ahead if the parties so wished.

What scope is there for temporary or transitional measures either agreed between the two parties or put in place unilaterally?

The parties have agreed in the withdrawal agreement that transitional measures end on 31 December unless extended by 1 July. They can reach another agreement superseding the withdrawal agreement if they wish, but that would take time and there is no sign that they intend to do so. The legal basis of Article 50 TEU would no longer be available for any such new agreement and the parties' respective rules governing the negotiation, conclusion and ratification of treaties would apply.

A party could decide unilaterally to apply temporary or transitional rules to the other.

• *Our previous witnesses have outlined four key areas of initial disagreement:*

- o Governance;*
- o Level Playing Field;*
- o Fish; and*
- o Co-operation in Criminal Matters.*

Have there been any recent developments in these areas?

No, not that I am aware of.

Could you sketch out possible compromises?

Compromises are conceivable and in the interests of both sides on almost all issues, but they will take time. The whole withdrawal process has been bedevilled by precipitation, deadlines, dogma and lack of careful preparation. There is scant evidence of willingness to contemplate, offer, accept and explain compromise. That is not surprising, because one would expect it to follow the engagement of both parties in detailed talks with the involvement where necessary of political leaderships.

Which other issues do you foresee emerging as sources of disagreement as the negotiations progress?

Enforcement, adjudication, consultation mechanisms, overlapping competition law jurisdictions, details of cooperation in respect of island of Ireland issues, security and border control cooperation, provision and regulation of services, interaction between the agreement(s) and the parties' other international trade agreements, foreign direct investment, Gibraltar....

Meanwhile, the playing field, however level or bumpy, is changing before our eyes with state intervention on a massive scale, calls for sovereignty, local production and shorter

supply chains and hostility to globalisation from left, right and green politics. Whether the “new normal”, whatever it is, will be easier or harder to coordinate between the EU and the UK depends on the detail and timing of changes in both jurisdictions, as well as on events elsewhere, such as the US Presidential election, the pace of recovery in China, the impact of the pandemic on migration and the outcome of enquiries into its causes and consequences.

- *Why does the EU want a single agreement and why does the UK want several separate agreements?*

The EU’s experience with Switzerland suggests that the interaction of various agreements and the lack of overarching enforcement mechanisms are a source of friction and frustration in relations with a close neighbour.

How would these different governance arrangements affect how any future relationship between the UK and the EU would operate? What are the standard forms of dispute resolution contained in FTAs? To what extent do these differ based on the scope of an FTA? What form of dispute resolution procedures are both parties seeking in this agreement? How do these differ from those set out in the Withdrawal Agreement?

I have not had time to prepare a full answer to these questions. I shall be happy to do so in future if the Committee so wishes.

Are precedents such as CETA and the EU-Japan FTA useful as templates for an agreement between the UK and EU? Based on both sides’ mandates, how would an UK-EU FTA differ from those precedents? What would be the possible implications of those differences with respect to, for example, level playing field provisions?

The EU’s position seems to be that such factors as proximity between the parties, including a shared land border in the island of Ireland, the volume and depth of their trade, the intricate relationship built up by 47 years of membership and their intertwined corporate, law enforcement and social networks, supply chains and service links mean that free trade agreements with distant countries are an inadequate model if one seeks to capture the wide range of issues previously dealt with by membership of the EU.

The UK’s position seems to be that it does not seek to capture that wide range of issues in one over-arching relationship. A simple FTA agreement could therefore be a good start to a relationship, the fuller contours of which would be filled in over the years as adjustments were made to the new realities brought about by Brexit, post-Covid 19 reconstruction, world trade developments and the new policy directions pursued by the UK and the EU themselves.

- *Is it normal for only one side of a negotiation to publish draft legal texts? Are there any benefits or drawbacks, for either side, from doing so? What are the UK’s main areas of contention going to be in the draft EU legal text? What proportion of the contents do you*

believe are acceptable to both sides and where will attention be focused? Because draft legal texts have been published at this stage, is an agreement more likely by the end of 2020?

It is normal for parties to have different rules and traditions about the publication of texts, parliamentary scrutiny and accountability. The danger is that they come across as dogmatic and intransigent, designed as they are mainly for domestic audiences. I do not think that the publication of draft legal texts makes an agreement more or less likely by the end of the year.

- *How likely is a transition period extension? Does an extension request from one party place any obligations on the other side? What steps would the UK and EU need to take for an extension to be agreed? What practical matters would need to be decided? What role would the UK Parliament and EU institutions play in this process? How might an extension affect the dynamics of the negotiations and the scope of any future agreement?*

The withdrawal agreement, assuming it is not amended, limits a possible extension to “up to two years”. For any extension to be agreed, agreement would have to be reached by 1 July within the Joint Committee created by the Withdrawal Agreement.

Article 126 of the Withdrawal Agreement:

“There shall be a transition or implementation period, which shall start on the date of entry into force of this Agreement and end on 31 December 2020.”

Article 132 of the Withdrawal Agreement:

“Notwithstanding Article 126, the Joint Committee may, before 1 July 2020, adopt a single decision extending the transition period for up to 1 or 2 years.”

In addition, s. 15 A of the UK’s European Union (Withdrawal) Act 2020 provides that “A Minister of the Crown may not agree in the Joint Committee to an extension of the implementation period.”

- *What actions does the UK Government believe it is legally required to take by 31 December 2020 to fulfil its obligations under the Withdrawal Agreement? Would a failure to implement the Withdrawal Agreement by either side prevent agreement on a future relationship from being reached? What areas of implementation are likely to prove most controversial? How might they be resolved?*

Failure to implement the Withdrawal Agreement would impair trust between the parties and made further cooperation more difficult.

May 2020



Committee on the Future Relationship with the European Union

House of Commons, London, SW1A 0AA

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24 April 2020

Sir Jonathan Faull
Chair of European Public Affairs
Brunswick Group

Dear Sir Jonathan,

The House of Commons Committee on the Future Relationship with the European Union is inquiring into the progress of the negotiations between the UK and the EU. Under normal circumstances, the Committee holds regular oral evidence sessions in Westminster. However, measures to prevent the spread of the coronavirus make this difficult.

The Committee is keen to gather as much evidence as possible to inform its deliberations so I am writing to you to ask whether you would be willing to help us with our work by making a written submission. We welcome general responses to our [call for evidence](#), which was published on 4 March. We also hope that you would be willing to answer some of the more specific questions set out below on issues that fall within your area of expertise. Such submissions need not address every bullet point and can include other matters that you think are relevant to the negotiations and should be drawn to the attention of the Committee.

- What impact has the COVID-19 pandemic had on the negotiations? Have the UK and EU been affected differently? What further consequences might the pandemic have on the progress of the negotiations and the nature of any future relationship?
- How would you characterise the approach the UK and EU are taking to the future relationship negotiations? In which ways, if any, do these approaches differ from the withdrawal negotiations? What new challenges might both parties face?
- What is your assessment of the likelihood of an agreement given both sides' negotiating mandates? Has this assessment changed since the talks began? If so, why?
- What progress would you expect to have been made by the end of June? How do you think talks might progress over the coming year? How long would you expect the UK and EU's respective ratification processes to take?
- Given the time constraint imposed by the Transition Period, what sort of agreement do you believe is possible between the UK and the EU? What issues should each side be prioritising? To what extent do the priorities set out in each side's negotiating mandates match your assessment of what they should be seeking? On which areas does each side have the most negotiating leverage?
- What would be the main differences between a UK/EU relationship as roughly set out by both sides' mandates and a no-deal scenario? If only a limited deal is agreed what are the possible consequences for areas that are not covered? What scope is there for temporary or transitional measures either agreed between the two parties or put in place unilaterally.
- Our previous witnesses have outlined four key areas of initial disagreement:
 - Governance;
 - Level Playing Field;
 - Fish; and
 - Co-operation in Criminal Matters.

Have there been any recent developments in these areas? Could you sketch out possible compromises? Which other issues do you foresee emerging as sources of disagreement as the negotiations progress?

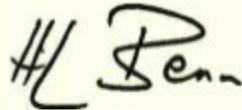
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The Committee staff will be happy to discuss the inquiry, any issues raised, or the process for submitting written evidence. You can contact them at freu@parliament.uk.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'H Benn'.

Hilary Benn
Chair of the Committee